

Exhibit 333

United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., et al.
v. Dey, Inc., et al., Civil Action No. 05-11084-PBS

**Exhibit to the August 28, 2009 Declaration of Sarah L. Reid in Support
of Dey's Opposition to Plaintiffs' Motion for Partial Summary Judgment**

NO. GV002327

THE STATE OF TEXAS) IN THE DISTRICT COURT
 ex rel.)
 VEN-A-CARE OF THE)
 FLORIDA KEYS, INC.,)
 Plaintiff(s),)
 VS.) TRAVIS COUNTY, TEXAS
)
 DEY, INC.; ROXANE)
 LABORATORIES, INC., WARRICK)
 PHARMACEUTICALS CORPORATION,)
 SCHERING CORPORATION,)
 SCHERING-PLOUGH CORPORATION,)
 LIPHA, S.A., MERCK-LIPHA,)
 S.A., MERCK, KGAA, and EMD)
 PHARMACEUTICALS, INC.,)
 Defendant(s).) 53RD JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF
 BRUCE TIPTON

February 13th, 2003

(CONTAINS ATTORNEYS' EYES ONLY TESTIMONY)

ORAL AND VIDEOTAPED DEPOSITION OF BRUCE TIPTON,

produced as a witness at the instance of the
 Plaintiff(s), and duly sworn, was taken in the
 above-styled and numbered cause on February 13th,
 2003, from 9:03 a.m. to 6:21 p.m., before Cynthia
 Vohlken, CSR in and for the State of Texas, reported
 by machine shorthand, at the Fairfield Inn by Marriott
 Carlsbad, 760 Macadamia Drive, Carlsbad, California
 pursuant to the Texas Rules of Civil Procedure.

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	December 11, 1995 Memo from Ross Uhl to Bruce Tipton, Subject: GeriMed and RxMed	

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1 **Q. Who did you interview with at Dey?**

2 A. Bob Mozak, and then eventually all -- well,
3 several of the senior management team members,
4 including the CEO and Charles Rice and others. I
5 don't remember now, but primarily with Bob.

6 **Q. What was the position that you took when you
7 came to Dey in October 1995?**

8 A. Initially it was -- initially it was national
9 sales manager of national accounts. Probably not
10 that -- that exact title, but it was national sales
11 manager and my responsibility was national accounts
12 and managed care, I think.

13 **Q. National accounts and managed care?**

14 A. Yeah. They didn't really have a managed care
15 department.

16 **Q. You interviewed with Bob Mozak and Charles
17 Rice. Did you also interview with Pam Marrs?**

18 A. Yes, I did. Thank you. Yeah.

19 **Q. And did you interview with Mary Anderle?**

20 A. Perhaps, yeah. She was there at the time.
21 No, no, no. I think she came -- no. She came on
22 board later. So no, I don't believe so.

23 **Q. Debbie Bronstein, did you interview with her?**

24 A. No. She -- both the last -- both Mary and
25 Debbie were hired after I joined Dey.

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1 **Q. Okay. So your first job position or job
2 title was to be in charge of national accounts and
3 managed care; is that -- is that correct?**

4 A. Well, yes. Again, you're talking about a
5 small organization. They lump national accounts.
6 Anything that wasn't tied down, you know, was national
7 accounts. So in a small organization it included the
8 traditional drug wholesalers, the retail chains. They
9 wanted to develop a presence of managed care, so I had
10 some experience there so they lumped that in. Again,
11 I don't think they knew -- well, they didn't know
12 exactly what was involved at the time in managed care.
13 And then the other -- the primary sales group worked
14 with the -- what's called the nonretail accounts or
15 institutional accounts, if you will.

16 **Q. So institutional accounts were somebody else,
17 not in your chain?**

18 A. Yeah. Early on. Well, yeah, institutional
19 accounts -- institutional accounts meaning primarily
20 the hospitals. That was definitely a different -- a
21 different group.

22 **Q. An account is a customer, correct?**

23 A. Yes.

24 **Q. Okay. So you had --**

25 A. Customer group.

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1 **Q. A customer group. You had underneath your
2 responsibility wholesalers and retail chains?**

3 A. Correct.

4 **Q. Did you have retail generic distributors or
5 were they lumped in with wholesalers?**

6 A. You know, they shifted back and forth. Early
7 on I did not. There was a year or so when -- when I
8 did and then ultimately they shifted back to the --
9 the other sales group.

10 **Q. Who was the other sales group that you are
11 referring to?**

12 A. That would be the institutional sales group.

13 **Q. Who did --**

14 A. The ones who called on the hospitals.

15 **Q. Okay. Who did -- well, strike that. Let me
16 ask you about your position as national accounts and
17 managed care manager. Was it manager of national
18 accounts?**

19 A. Uh-huh. National sales manager.

20 **Q. Okay. Were you headquartered as far as your
21 duty station here in Napa?**

22 A. Yes.

23 **Q. Okay. But you spent some time on -- on the
24 road as well.**

25 A. Correct.

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1 **Q. Did you have a staff of sales representatives
2 out in the field?**

3 A. I did.

4 **Q. How many?**

5 A. Early on it was four or five. Four or five
6 early on and then that group expanded to about six
7 when I left. So between four and six.

8 **Q. Four and six and these individuals were sales
9 representatives?**

10 A. Yeah. National account managers is what they
11 were called, but essentially, yes.

12 **Q. Okay. National account managers.**

13 A. Right.

14 **Q. And these national account managers that
15 reported to you, were they spread out across the
16 United States?**

17 A. Yes.

18 **Q. Okay. And they were calling on wholesalers
19 and retail chains; is that correct?**

20 A. Correct. And -- and we had the -- we had the
21 respiratory -- I can't remember the name we called
22 these folks, but they specialized in respiratory
23 therapy.

24 **Q. Respiratory therapists?**

25 A. Well, they didn't call on the respiratory

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1 therapists, but they called on some businesses that --
 2 essentially they did mail order respiratory solution
 3 is what they did. Home care -- home care pharmacies
 4 is what they were called and their business for us,
 5 for Dey, was distribution of -- of respiratory
 6 solutions.
 7 **Q. I see. Did you also call on long-term care**
 8 **facilities, or your people?**
 9 A. Yeah. Yeah, we did. And I think from the
 10 very beginning we did, if I remember.
 11 **Q. Did Mr. Ross Uhl report to you?**
 12 A. He did, yes.
 13 **Q. Did Lou Barricelli report to you?**
 14 A. No.
 15 **Q. Did Rick Upp report to you?**
 16 A. Yes. At one time Rick -- Rick when I first
 17 joined the company was on the other side of the
 18 business as the regional or district manager and then
 19 he joined national accounts group about midstream my
 20 involvement with Dey.
 21 **Q. Jim Bucaric, did he report to you?**
 22 A. He did not.
 23 **Q. He did not. He was in the institution side.**
 24 A. He was, yeah.
 25 **Q. So on the occasions that you were traveling**

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1 outside of Napa were you visiting the four to six
 2 national account managers that worked for you and
 3 riding along with them, going with them on account
 4 calls?
 5 A. Yes.
 6 **Q. Did you know a gentleman by the name of Ron**
 7 **Tipton?**
 8 A. No, but -- but I understand that there was a
 9 Ron Tipton that worked in the inside sales group with
 10 Dey, but I think he left shortly after I joined the
 11 organization, but I think that's -- that's the name.
 12 **Q. You never met him?**
 13 A. No, I never met him.
 14 **Q. Not any relation to you as far as you know?**
 15 A. As far as I know.
 16 **Q. Okay.**
 17 A. Sure is a good man though.
 18 **Q. When you came to Dey Labs in October of 1995**
 19 **did you get any kind of specialized training or did**
 20 **they expect you to hit the ground running?**
 21 A. The latter. They expected me to hit the
 22 ground running.
 23 **Q. Did they give you any kind of instruction on**
 24 **Dey's products, on the merits of the specific drugs**
 25 **Dey manufactured?**

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1 A. I'm sure I went through a brief training, but
 2 again, with -- with generics, they're commodity
 3 products. You're not selling the doctor. You don't
 4 have to get into chemicals, the chemical structure,
 5 the physiology. You've got a product and you've got a
 6 price and you've got a reputation.
 7 **Q. And you're trying to find a way to**
 8 **distinguish your product versus your genetic (sic)**
 9 **competitor's product?**
 10 A. Generic competitors, yeah.
 11 **Q. Well, when you got to Dey Labs did somebody**
 12 **tell you or give you any instruction on the Medicaid**
 13 **system and -- and the whole concepts of the way that**
 14 **the spread is a factor?**
 15 A. No.
 16 **Q. Is that something you learned on the job?**
 17 A. Correct.
 18 **Q. Through conversations with colleagues and --**
 19 A. Yeah. It's just really if you understand the
 20 big picture in the business, something that you
 21 would -- you would pick up on. I never had a class,
 22 never had someone sit me down and tell me this is how
 23 it worked.
 24 **Q. Did anybody --**
 25 A. Learned through experience.

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1 **Q. Excuse me. I didn't mean to talk over you.**
 2 **Are you finished?**
 3 A. That's okay. Yeah.
 4 **Q. When you were at Dey did anybody ever tell**
 5 **you that a part of the manner in which Dey was going**
 6 **to sell its products was by enhancing the spread on**
 7 **Medicaid and Medicare reimbursements?**
 8 A. No.
 9 **Q. Did you ever see anything in writing in that**
 10 **regard?**
 11 A. No. The only thing that I recall is some
 12 creative salespeople recognizing that spread was an
 13 element of a customer decision may have prepared
 14 something that highlighted where we stood. But every
 15 customer that -- where spread was an important issue
 16 knew the company's products and prices and oftentimes
 17 told us you -- we can't do business with you because
 18 your spread is -- is not good enough, or whatever. So
 19 the customers knew much better than the sales reps, in
 20 my opinion, what products should be used because of
 21 the spread and where it was advantageous to them or
 22 not. So that's how the market was.
 23 **Q. And the customers for whom spread was an**
 24 **important issue would have been the retail chain**
 25 **pharmacies; is that correct?**

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1 MR. HAGENSWOLD: Same objection.
 2 A. If he said it I believe it. Sure.
 3 Q. (BY MR. WINTER) So you don't think
 4 Mr. Rice -- I don't want to talk over you. Are you
 5 finished with your answer?
 6 A. I'm finished. Sure.
 7 Q. So you don't think Mr. Rice knew about the
 8 usage of Exhibit 461 or other documents which promoted
 9 the reimbursement profit or spread to customers?
 10 A. I -- I have no idea whether he knew or not.
 11 Q. Okay. Mr. Mozak testified that he didn't
 12 authorize or approve the use of Exhibit 461 or of
 13 documents that promoted for customers and potential
 14 customers the reimbursement profit that those
 15 customers could get on a Dey product versus a
 16 competitor's product. He testified that he didn't
 17 approve it and he would not have authorized it. Do
 18 you believe that testimony from Mr. Mozak?
 19 A. Yes. If he said it I believe it.
 20 Q. How do you reconcile Mr. Mozak's testimony
 21 that he did not approve it with what you've testified
 22 now as to your experience working at Dey labs and the
 23 fact that in your experience Dey did use Exhibit 461
 24 and other promotional products that outlined the
 25 difference in reimbursement profit?

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1 A. This is -- this is a form. It's on paper.
 2 It's -- it's a hard copy. It's not -- it wasn't
 3 uncommon to talk about spread advantages. Everybody
 4 in this business, in the generic business talked about
 5 it. Our customers knew when we walked in how our
 6 spread was compared to others. So it's no secret
 7 what -- what the spread was, so in the context of
 8 selling one would look for whatever was reasonable to
 9 differentiate himself from the competition. This was
 10 just one other tool.
 11 I think this was short-lived, using --
 12 using this document, as I remember, and, you know, I
 13 wouldn't necessarily place any more emphasis on this
 14 than -- in terms of our overall selling strategy than
 15 the fact that our preservative -- our product was
 16 preservative free, had a better package, we had a
 17 better reputation, et cetera.
 18 MR. McDONALD: Objection --
 19 MR. WINTER: Objection, nonresponsive.
 20 MR. McDONALD: -- nonresponsive.
 21 MR. HAGENSWOLD: Objection, from.
 22 Objection, nonresponsive.
 23 Q. (BY MR. WINTER) Mr. Tipton, let me -- let me
 24 ask this question. You've testified that everybody
 25 promoted their products by using -- or strike that.

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1 You testified that all pharmaceutical companies in
 2 your experience were promoting the reimbursement
 3 profit that a customer could get by outlining the
 4 spread. Is that accurate?
 5 MR. McDONALD: Object to the form.
 6 MR. HAGENSWOLD: Object to the form.
 7 MR. McDONALD: Object to the form.
 8 A. If a competitor had a spread advantage in my
 9 experience they would make that known to the customer
 10 if the customer was not already aware of it.
 11 MR. McDONALD: Objection, nonresponsive.
 12 Q. (BY MR. WINTER) And within Dey it was
 13 well-known that spread was an issue and a factor in
 14 some classes of customers' decision-making process
 15 when they were selecting which generic pharmaceutical
 16 to buy?
 17 A. Well-known, I think certain people knew about
 18 it.
 19 Q. Did Mr. Mozak know about it?
 20 A. I don't know. I would think so. I -- I
 21 don't know for sure.
 22 Q. Is it your best recollection that Mr. Mozak
 23 knew about it because you had conversations with him
 24 about it from time to time?
 25 MR. FLECKMAN: Objection, form.

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1 A. I believe he was aware that we had some
 2 pricing -- some spread advantages.
 3 Q. (BY MR. WINTER) And my question is given
 4 that you had conversations with Mr. Mozak from time to
 5 time about spread and that your customers would come
 6 to you and tell you if there was a reason why they
 7 couldn't purchase Dey's products because a
 8 competitor's spread was better, if that was the type
 9 of information that was known to Dey's management how
 10 can you -- and given the fact that Exhibit 461 there
 11 Mr. Galles testified had gone through copy clearance
 12 and had been approved for distribution, how then can
 13 you reconcile Mr. Mozak's testimony where he said he
 14 didn't know anything about it and wouldn't have
 15 approved it?
 16 MR. HAGENSWOLD: Object to the form.
 17 MR. FLECKMAN: Objection, form.
 18 MR. McDONALD: Object to the form.
 19 A. I can't speculate on --
 20 Q. (BY MR. WINTER) Okay.
 21 A. -- what Todd Galles said and Mr. Mozak said
 22 and why Bob may or may not have approved it.
 23 Q. And again, I'm not asking you to speculate as
 24 to what Todd Galles said. I'm telling you what Todd
 25 Galles said.

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1 making that known.
 2 **Q. To a customer?**
 3 A. To a customer.
 4 **Q. Or a potential customer?**
 5 A. Correct.
 6 **Q. Okay. In your opinion there's -- that's a**
 7 **legitimate sales technique?**
 8 A. If -- if that's the fact of the marketplace.
 9 Usually those customers that I mentioned before are
 10 savvy enough to know that on their own. More often
 11 than not as I recall they would tell me these are the
 12 products we are buying because the -- to a large
 13 degree because the spread is -- is better. So it's no
 14 secret.
 15 MR. McDONALD: Objection, nonresponsive.
 16 **Q. (BY MR. WINTER) When you were employed at**
 17 **Dey did Ross Uhl come to you with proposals from time**
 18 **to time that he asked you to review and approve before**
 19 **they could be submitted to customers?**
 20 A. Yes.
 21 **Q. Do you recall reviewing and approving a**
 22 **proposal to an outfit called Managed Healthcare**
 23 **Associates?**
 24 A. Do I recall a proposal to Managed Healthcare
 25 Associates from Ross Uhl, was that the question?

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1 **Q. Yes, sir.**
 2 A. I don't -- they were a customer, he had
 3 responsibility for them for a certain period of time.
 4 I'm sure he had proposals on how the do business with
 5 them, I don't -- you know, other than that I don't
 6 recall a specific one.
 7 **Q. Do you recall -- what, sir, is Managed**
 8 **Healthcare Associates?**
 9 A. I'm sorry?
 10 **Q. What kind of customer is Managed Healthcare**
 11 **Associates?**
 12 A. They're a long-term care GPO.
 13 **Q. Do you recall another GPO by the name of**
 14 **GeriMed?**
 15 A. Yes.
 16 **Q. Do you recall whether Mr. Uhl came to you**
 17 **with a proposal that he wanted to present to GeriMed?**
 18 A. I do not.
 19 **Q. When we take a break we'll see what exhibit**
 20 **number this is. I believe it's already in --**
 21 **designated as an exhibit in these depositions and if**
 22 **not we'll find another -- give a new number to it.**
 23 MR. FLECKMAN: Let me -- let me suggest
 24 then that we just identify it by Bates --
 25 MR. WINTER: Sure.

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1 MR. FLECKMAN: -- number for now.
 2 MR. WINTER: Be happy to.
 3 **Q. (BY MR. WINTER) I'm handing you a copy of a**
 4 **multi-page document that begins with Bates Number**
 5 **DL-TX-0029703. Do you see that, sir, on the**
 6 **right-hand column?**
 7 A. I do.
 8 MR. McDONALD: Ray, I hate to interrupt
 9 you. My copy you gave me has -- says Exhibit 328 on
 10 it.
 11 MR. WINTER: Oh, great.
 12 MR. FLECKMAN: That is what it is.
 13 MR. WINTER: Thank you. I appreciate
 14 it. 328?
 15 MR. McDONALD: That's somebody's
 16 handwriting. I propose -- suppose it's yours.
 17 MR. WINTER: That's probably mine. Do
 18 we have 328 with us today? We do.
 19 **Q. (BY MR. WINTER) Let me go ahead and give you**
 20 **the one that's already in -- in the evidence here or**
 21 **part of the deposition exhibits. Mr. Tipton, here you**
 22 **go.**
 23 A. Okay.
 24 **Q. Thank you. Now, that exhibit, 328, do you**
 25 **recognize it, sir?**

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1 A. Vaguely.
 2 **Q. Can you tell us what it is?**
 3 A. Well, I'll review it. It looks as though
 4 this is a review of how the profitability would be
 5 enhanced by using unit-dose versus the multi-dose.
 6 **Q. Profitability for whom?**
 7 A. For the customer. In this case this would be
 8 MHA.
 9 **Q. And would that be the profit that MHA's**
 10 **members could make on Medicaid reimbursement?**
 11 A. That's what it looks to be, yes.
 12 **Q. And do you recall whether or not Mr. Uhl**
 13 **presented this document to you for your review and**
 14 **approval before he utilized it out in the field?**
 15 A. I do not remember. This appears to be just
 16 a -- plugging the numbers into the template that was
 17 previously provided as 460.
 18 **Q. During the time period that Mr. Uhl reported**
 19 **to you before he could have utilized the document such**
 20 **as Exhibit 328 would he have had to present it to you**
 21 **for your approval before using it?**
 22 A. No.
 23 **Q. Okay. I will hand you now what is marked as**
 24 **Exhibit 489 and the Bates label on that is DL1584 and**
 25 **it's a multi-page document that runs through DL1592.**

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1 that one individual on one occasion reported
 2 excessively inflated WAC prices to a data reporting
 3 service --
 4 MR. WINTER: Objection, form.
 5 Q. (BY MR. FLECKMAN) -- for Albuterol sulfate
 6 solution, three products, I think. Were you aware of
 7 such an occurrence?
 8 A. Yes.
 9 Q. Okay. Tell me what you know about that.
 10 A. I know secondhand that there was a situation
 11 in the state of Florida whereby an incorrect AWP was
 12 listed for a competitor and after numerous attempts to
 13 get that state to provide and list the correct one the
 14 response from Dey was to adjust their price to -- just
 15 to be on even ground with competition.
 16 Q. Who did you talk with about that? You say
 17 that that's -- that that's secondhand information to
 18 you.
 19 A. Someone mentioned -- I don't remember who
 20 mentioned it to me specifically, but I remember
 21 someone saying that that -- that that had occurred.
 22 Q. Was this -- was this -- do you recall when
 23 this information was imparted to you?
 24 A. I don't.
 25 Q. Okay. So you can't place it in time frame,

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1 but you're positive that you were not personally
 2 involved in this?
 3 A. I'm positive I was not involved in it, right.
 4 Q. Okay. And you're positive that you do not
 5 recall who it was.
 6 A. Correct.
 7 Q. And you're positive you do not recall who
 8 told you about it.
 9 A. I do not.
 10 Q. And you don't recall when they told you about
 11 it.
 12 A. Not exactly, no.
 13 Q. Okay. And do you recall ever receiving a
 14 written memo advising you at the time that that was
 15 occurring?
 16 A. No.
 17 Q. Okay. If you had seen such a memo would it
 18 have made an impact on you such that you would have
 19 remembered receiving such a memo?
 20 A. Yes.
 21 Q. Okay. I'm going to hand you a memo that --
 22 MR. FLECKMAN: Mr. Winter, would your
 23 memory be such that you would recall what the -- what
 24 the -- you don't need to record this. Let's go off
 25 for a second.

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1 THE VIDEOGRAPHER: You want to go off
 2 the record, off the video?
 3 MR. FLECKMAN: Yes.
 4 THE VIDEOGRAPHER: We're off the record
 5 at 4:06 p.m.
 6 (Discussion off the record)
 7 THE VIDEOGRAPHER: We're back on the
 8 record at 4:06 p.m.
 9 Q. (BY MR. FLECKMAN) Okay. Let me ask -- let
 10 me read something to you and I'll ask you whether you
 11 agree or disagree this statement. WAC is -- "WAC was
 12 Dey's published wholesale list price to
 13 manufacturers." "WAC was Dey's published wholesale
 14 list price to manufacturers for its generic drugs."
 15 A. To manufacturers?
 16 Q. No, no. Forgive me. Let me try that one
 17 again. Good listening. The -- "WAC was Dey's
 18 published wholesale list price for its generic drugs
 19 to wholesalers."
 20 A. Right.
 21 Q. Okay. Now, let me read another statement to
 22 you and see whether you agree or disagree with this.
 23 "WAC is not representative of Dey's published
 24 wholesale list prices." Do you agree or disagree with
 25 that?

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1 A. Disagree.
 2 Q. Is that accurate or is that inaccurate?
 3 A. It's inaccurate.
 4 Q. Why is that inaccurate?
 5 A. Our wholesale acquisition cost was our
 6 published price and that's what we charged
 7 wholesalers.
 8 Q. Okay. Now, let me show you a memo and ask
 9 you whether -- this is Exhibit Number 72. Just look
 10 at the first page because the second page is not part
 11 of Exhibit 72. And I'm going to ask you if you have
 12 ever seen this memo from Helen Burnham at or about the
 13 time it was dated, May 30, 1995?
 14 A. I do not remember seeing this.
 15 Q. Okay. I'm going to represent to you that you
 16 have company in that respect because Eve Gmeiner, who
 17 worked for Ms. Burnham at the time, never saw it, Todd
 18 Galles never saw it and Rob Ellis never saw it, Lou
 19 Barricelli doesn't recall it and Ross Uhl doesn't
 20 recall it. I don't think Mary Anderle recalls it.
 21 MR. WINTER: Objection, form.
 22 Q. (BY MR. FLECKMAN) Now, my question to you is
 23 did Ms. Burnham ever mention anything about that to
 24 you in 1995?
 25 A. No.

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1 Q. Okay. Would -- if you had seen such a memo,
2 and you've already indicated that you disagree with
3 the paragraph at the bottom of the memo.

4 MR. WINTER: Objection, form.

5 Q. (BY MR. FLECKMAN) Is that accurate?

6 A. Uh-huh.

7 Q. I'm sorry? You have to give a verbal
8 statement.

9 A. Yeah. I disagree that WAC is not
10 representative of our published wholesale list price.

11 Q. If this memo had been provided to you would
12 you have remembered this memo?

13 A. Yes.

14 Q. Does this memo seem to you consistent or
15 inconsistent with Dey's practices and policies
16 regarding the reporting of WAC for its generic
17 products while you were with that company?

18 A. Inconsistent.

19 Q. Do you -- if Mr. Mozak has testified that he
20 did not know of the existence of this memo in 1995 and
21 he did not authorize Ms. Burnham to send that memo and
22 that he was not aware that she had done so in 1995,
23 would you find that credible or incredible?

24 A. Credible.

25 MR. LIRA: I'll object. Foundation.

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1 Object to the form.

2 MR. FLECKMAN: Okay.

3 MR. WINTER: Object to form.

4 A. Credible

5 Q. (BY MR. FLECKMAN) The -- did you have any
6 dealings with Helen Burnham other than the interview
7 you had with her when you took the job?

8 A. Define "dealings."

9 Q. Business dealings with her while you were at
10 Dey.

11 A. Yes.

12 Q. Okay. Would you describe your interactions
13 with Helen Burnham, generally your impression of her
14 over that period of time that you dealt with her.

15 A. She was the marketing department pretty much
16 when I joined the company. Of course, other people
17 joined thereafter. Her style was -- she is a
18 pharmacist. She knew her business. Definitely was
19 knowledgeable about the -- the Dey products. If you
20 want -- if you'd like me to comment on her personality
21 or style I'll --

22 Q. I'm going to ask you about that next.

23 A. Okay.

24 Q. I'm going to ask you about that next. Tell

25 me -- and I -- we are not here to savage anybody, but

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1 this is important because she's testified that she
2 told everybody in sales and marketing about this memo
3 and gave everybody a copy of it and I haven't yet
4 found anybody who received a copy of this.

5 MR. WINTER: Objection, form.

6 MR. FLECKMAN: That's fine.

7 Q. (BY MR. FLECKMAN) The -- so my question to
8 you is what was Ms. Burnham's personality as you
9 recall it during the six -- approximately six years --
10 let me rephrase that. During the period of over or
11 roughly a year that you had interactions with
12 Ms. Burnham at Dey?

13 A. She was very determined. She was outspoken.

14 She was also kind and generous. And as I said before,
15 she, you know, she was the marketing department pretty
16 much for the times that -- that we worked together.

17 Q. Did she -- did she demonstrate to your
18 observation any tendency to go to Bob Mozak for
19 approval of decisions that she made in each and every
20 instance?

21 MR. LIRA: I'm going to object to form.

22 MR. FLECKMAN: That's fine.

23 Q. (BY MR. FLECKMAN) You can answer that.

24 A. I don't -- I can't really judge that. I

25 can't determine that.

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1 Q. Okay. You've said that she was -- that
2 Ms. Burnham was a determined person. Do you think it
3 would be consistent or inconsistent with your
4 observation of her personality for her to make a
5 decision on her own to do something of what is
6 reflected in that memo, Exhibit 72, to report
7 exaggerated WACs to reporting services?

8 A. I can't --

9 MR. WINTER: Objection, form.

10 MR. LIRA: Objection to form.

11 A. I can't make that judgment.

12 MR. FLECKMAN: What is your objection to
13 form?

14 MR. WINTER: You're talking to me or
15 Mr. Lira?

16 MR. FLECKMAN: Both of you.

17 MR. LIRA: Calls for speculation on his
18 part and lacks foundation.

19 MR. FLECKMAN: Okay. What is your
20 objection to form?

21 MR. WINTER: Use of the term
22 "exaggerated."

23 MR. FLECKMAN: That's your only
24 objection to form?

25 MR. WINTER: Yeah.

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1 MR. HAGENSWOLD: Same objection.
 2 A. I'm not clear on the question.
 3 Q. (BY MR. FLECKMAN) That's fine. I'm going
 4 to -- I'm going to cure it.
 5 A. Okay.
 6 Q. To what extent as a -- as a -- just a matter
 7 of day-to-day experience within the selling function
 8 at Dey was spread -- did spread have to be addressed?
 9 To what extent did the issue of spread have to be
 10 taken into account in your selling program?
 11 A. It was -- with selected customers at the
 12 forefront of the discussions, with some customers it
 13 was one of many concerns and considerations that a
 14 customer would use to determine whether or not they
 15 would purchase your product.
 16 In the generic world it was a common
 17 topic of discussion, how you stacked up relative to
 18 the spread, again, with certain customers depending --
 19 dependent -- was a determinant on whether you got the
 20 business or maintained the business.
 21 MR. HAGENSWOLD: Objection,
 22 nonresponsive.
 23 MR. McDONALD: Same objection.
 24 Q. (BY MR. FLECKMAN) Did you ever at Dey while
 25 you were there, did -- do you ever recall a situation

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1 where you -- while you were there where you increased
 2 WACs in order to build spread?
 3 A. No, I don't recall that.
 4 Q. The -- do you recall that while you were at
 5 Dey that was not the policy of Dey?
 6 A. It's not -- it was not the practical policy
 7 of Dey to -- to do that, no.
 8 Q. The -- you mentioned at the outset of your
 9 deposition that you had spoken very briefly with me
 10 and with Mr. Hudspeth and you thought that the -- that
 11 we both had been on the phone and -- and I'll
 12 represent to you that we, in fact, were both on the
 13 phone with you. Did we in any way attempt to
 14 influence your testimony in any respect other than to
 15 tell the truth?
 16 A. No.
 17 Q. Okay. The -- do you have a recollection of
 18 talking with Mr. Winter?
 19 A. Yes.
 20 Q. Okay. And I take it Mr. Winter did not
 21 suggest to you any alteration in your testimony
 22 either, did he?
 23 A. No, he did not.
 24 Q. Okay. The -- and you spoke with him on two
 25 or three occasions?

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1 A. Yes.
 2 Q. Okay. You said at one point during the
 3 examination earlier today that with respect to the
 4 issue of spread in your view and based on your
 5 experience the customers knew better than the sales
 6 representatives about the issue of spread. What did
 7 you mean by that?
 8 A. I mean that their business was dependent
 9 upon knowing what the spread was. Their
 10 profitability, again, with these customers who are
 11 highly dependent upon, with Medicaid prescriptions in
 12 particular, long-term care providers, their
 13 business -- the profitability of their business
 14 depended upon their reimbursement levels and they knew
 15 the products that had favorable spreads and the ones
 16 that did not.
 17 Q. Did you generally regard the customers that
 18 you dealt with while you were at Dey as being savvy,
 19 experienced customers?
 20 A. Most of them.
 21 Q. The -- did they seem to understand the
 22 dynamics of the marketplace fairly well, the ones you
 23 dealt with?
 24 A. Yes.
 25 Q. With regard to the product that is shipped by

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1 Dey to a wholesaler, during the time when you were
 2 with Dey, would you have a way of matching specific
 3 lots of medicine, I-o-t-s, lots of medicine or cartons
 4 of medicines to shipments from the wholesaler to
 5 various customers? Did you have at Dey a mechanism
 6 for tracking exactly what lots went out the door
 7 from the --
 8 A. Yes.
 9 Q. -- from the wholesaler?
 10 A. Yes.
 11 Q. Okay. The -- aside from -- aside from -- and
 12 whose function was that to do that?
 13 A. Distribution. It wasn't a sales function by
 14 any means, so --
 15 Q. Okay. So you were not involved in that?
 16 A. -- the warehouse -- no, I was not.
 17 Q. Okay. Are you guessing at -- at the
 18 mechanism? Would you be guessing at the mechanism?
 19 Is that something that you were intimately familiar
 20 with and dealt with or is that something --
 21 A. I just -- I believe that we had that
 22 mechanism. We had some recalls and we had a way of
 23 identifying, as I recall, where the product went. So
 24 I'm not guessing, but I'm not 100 percent certain. I
 25 just remember that that occurred and we could identify

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1 A. Okay.

2 Q. NDC number would be 495020697-03. Do you see

3 an entry for that NDC number on the red flagged page?

4 There's actually two red flags but if you go deeper

5 into --

6 MR. FLECKMAN: Could you give us a Bates

7 page?

8 MR. WINTER: If I get the document back

9 I sure will.

10 MR. FLECKMAN: That's all right.

11 A. Okay. Now, which -- you're talking about

12 Albuterol 25's. Do I see the \$14 price?

13 Q. (BY MR. WINTER) Yes, sir. First of all,

14 let's look at the top of the page and provide a Bates

15 number here. It's DL-TX-0079910. And across the top

16 of the page you see columns that designate different

17 NDC numbers?

18 A. Uh-huh. I do.

19 Q. And do you see an NDC number that ends with

20 69703 and dollars per carton?

21 A. Yeah. I think those are actually Dey's

22 product number, but -- as opposed to NDC numbers, but

23 yes, I do see that.

24 Q. Okay. And that product number, if it had the

25 prefix, would be the complete NDC?

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1 A. Yeah, I think -- I think that's how it

2 worked.

3 Q. And would that be the --

4 A. Yes.

5 Q. -- product number for the Albuterol 25's, if

6 you know?

7 A. I believe so.

8 Q. Okay. Do you see -- were there any prices on

9 this page that are at \$14.50 or more?

10 A. No. I see \$14.

11 Q. Flip through the document, the -- all the

12 pages for that column for 69703. Do you see any

13 prices at \$14.50 or more for that product?

14 MR. FLECKMAN: Objection, form.

15 A. No.

16 Q. (BY MR. WINTER) Okay. So for -- at least

17 for this time period of July and August 1995 nobody

18 was purchasing Dey's .083 percent Albuterol sulfate

19 inhalation solution at a WAC plus price?

20 MR. FLECKMAN: Hold on just one second.

21 Objection, form.

22 MR. McDONALD: Same objection.

23 A. These are just contracts prices. These are

24 just contract price. It doesn't mean nobody was

25 buying it.

1 Q. (BY MR. WINTER) So is there another universe

2 of customers that are not on that list?

3 A. If somebody did not have a contract they

4 would not show up on here and -- and they may have

5 purchased the Dey product at a higher price. It would

6 be WAC plus an up charge.

7 Q. You were asked about the profit gain Excel

8 spreadsheet, and it appears on many different

9 exhibits, but let's just show you Exhibit 462. I'll

10 put it back in front of you again so you can refer it.

11 And if I understood your responses to questions that

12 were posed by Mr. Lira correctly, you said that you

13 recall that some point in time you had heard or

14 received instruction that that document, that profit

15 gain Excel spreadsheet was no longer to be used.

16 A. Yeah. Either it -- either it was

17 communicated or it died a death on its own. I'm

18 not -- I'm not clear on how that happened.

19 Q. And I want you to focus now on when you

20 believe it happened that it was either communicated or

21 it died a death on its own, but in any event it was no

22 longer to be used.

23 A. Yeah. I think my comment earlier was it was

24 short-lived and I -- I would say less than two years.

25 Q. So do you think it was sometime in 1997?

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1 A. Yes.

2 Q. Do you recall a period in 1997 when Dey

3 received a subpoena from the Health and Human Services

4 Commission, Federal Office of the Inspector General

5 related to an inquiry or investigation about Dey's

6 pricing?

7 A. All I -- all I -- I don't remember, you know,

8 the date. I do remember being advised that that

9 inquiry was -- was occurring.

10 Q. Now, do you recall whether this instruction

11 or this -- this death on its own of utilization of

12 this exhibit, this profit gain XLS, whether that

13 occurred after this investigation that you recall?

14 A. I don't.

15 Q. You don't know one way or the other?

16 A. I do not.

17 Q. Did you come up with -- well, strike that.

18 You testified that there was a time

19 period in your experience at Dey where the national

20 account managers who reported to you would utilize

21 this profit gain XLS spreadsheet, correct?

22 A. Yes.

23 Q. Okay. My question is did you come up with

24 the idea to instruct your national account managers to

25 utilize that profit gain XLS or any other mechanism

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1 price to the state of Florida --
 2 A. No, to the Medicaid, I guess.
 3 Q. To state of Florida's Medicaid authority?
 4 A. Yeah.
 5 Q. Was the price that Dey gave to the state of
 6 Florida's Medicaid authority a price that was raised
 7 or elevated from its ordinary listed WAC price?
 8 MR. FLECKMAN: Objection, form.
 9 A. I don't -- I don't know for sure that that
 10 was the case.
 11 Q. (BY MR. WINTER) In your experience working
 12 with Helen Burnham did you have occasion to make any
 13 judgment as to her integrity?
 14 A. Not really, no.
 15 Q. Did it ever come to your attention that she
 16 had lied about anything?
 17 A. No.
 18 Q. So did you have any reason then to conclude
 19 that she was untruthful?
 20 MR. FLECKMAN: Objection, form. About
 21 what? Objection, form.
 22 A. Did I have any reason to believe that Helen
 23 Burnham was untruthful?
 24 Q. (BY MR. WINTER) Yes, sir.
 25 A. No.

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1 Q. In the situation that we've talked about a
 2 few minutes ago when someone, a -- a representative of
 3 a retail pharmacy, for example, who did not have a
 4 contract --
 5 A. Correct.
 6 Q. -- came to Dey and wanted to purchase Dey's
 7 products, that's the situation you described where you
 8 would direct that representative to the wholesaler,
 9 correct?
 10 A. Representative -- yes, Dey representative.
 11 It very often would come in through the phone through
 12 customer service.
 13 Q. Just to make sure, I don't think I asked the
 14 question very well. Let me -- let me try again. If
 15 you had a representative from a retail pharmacy who
 16 was not on a contract and they came to you or to one
 17 of the people that you supervised and wanted to
 18 purchase Dey's products would the -- do I understand
 19 correctly that the response you or your subordinates
 20 would give to that pharmacy representative would be to
 21 direct the pharmacy representative to go talk to the
 22 wholesaler?
 23 A. First of all, that scenario would not occur
 24 with our group. We call it national accounts, so an
 25 independent retailer would not -- we would not be in

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1 contact with them typically. If that question arose
 2 it would be generated by the customer to customer
 3 service and my advice to customer service would be to
 4 direct them to the wholesaler.
 5 Q. Do you have any specific recollection of this
 6 scenario coming up where customer service came to you
 7 and said, "Hey, I've got this contact from this
 8 independent retailer. What do I do?"
 9 A. No.
 10 Q. Now, a chargeback occurs when a wholesaler
 11 who is, if I understand your testimony correctly,
 12 buying Dey's product at WAC prices, is then in a
 13 position where it's going to turn around and sell the
 14 product to a customer who has a separate contract with
 15 Dey, correct?
 16 A. With Dey and the GPO, typically.
 17 Q. Okay. So in other words, to be more precise
 18 then, a chargeback situation occurs when a wholesaler,
 19 such as McKesson or Bergen, who has purchased a
 20 quantity of Dey product at WAC prices is going to turn
 21 around and sell that same product or a portion of that
 22 product to a customer who is a member of a GPO that
 23 has a contract with Dey, correct?
 24 A. Yes.
 25 Q. Okay. Did you recall or do you recall a time

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1 period when major wholesalers such as McKesson or
 2 Bergen Brunswick required Dey to provide chargeback
 3 credits up front before the transaction between the
 4 wholesaler and the membership of the GPO?
 5 A. Do I recall when they requested that, is that
 6 your question?
 7 Q. Well, my question is --
 8 A. Or required that?
 9 Q. I guess I used the word --
 10 A. Yeah.
 11 Q. -- "required" in my question.
 12 A. Yeah.
 13 Q. And -- and let me ask that question first.
 14 Do you recall a time period where the major
 15 wholesalers such as McKesson and Bergen Brunswick
 16 required Dey to provide that chargeback up front?
 17 A. I do not recall a situation where they
 18 required that, no.
 19 Q. Do you recall a situation where the major
 20 wholesalers such as Bergen Brunswick and McKesson
 21 requested that Dey provide the chargeback up front?
 22 A. I do and -- and I don't believe it was either
 23 McKesson or Bergen. It was someone else, as I
 24 remember, another wholesaler.
 25 Q. Okay. But you don't recall the name of that